INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	8
Conclusion	15

CITATIONS

Cases:

Barker v. *Wingo*, 407 U.S. 514	14
Chambers v. *Mississippi*, 410 U.S. 284	11
Davis v. *North Carolina*, 384 U.S. 737	13
Lyons v. *Oklahoma*, 322 U.S. 596	12
Maguire v. *United States*, 396 F.2d 327, certiorari denied, 393 U.S. 1099	13
Miranda v. *Arizona*, 384 U.S. 436	12, 13
Shinko v. *United States*, 408 F.2d 361	12
Stassi v. *United States*, 410 F.2d 361	9
United States v. *Culp*, 472 F.2d 459, certiorari denied, 411 U.S. 970	13
United States v. *Davis*, 459 F.2d 167	12
United States v. *Kinsey*, 352 F. Supp. 1176	13

Statutes:

18 U.S.C. 924(c)(2)	3
18 U.S.C. 3501	8, 12
18 U.S.C. 3501(c)	8
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-285

RICHARD LYNN BARNETT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-5339

DEMETRI THOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 75-285, App. A) is reported at 512 F.2d 811.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1975 (Pet. No. 75-285, App. B). A petition for rehearing was denied on July 25, 1975 (Pet. No. 75-285, App. C). The petitions for a writ of certiorari were filed, respectively, on August 8 and 25, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Barnett's arrest was supported by probable cause.

2. Whether petitioner Barnett was prejudiced by the trial court's comment on the testimony of a witness.

3. Whether petitioner Barnett was denied his right to cross-examine a witness because the prosecution was allowed to cross-examine the witness.

4. Whether petitioner Thor's confessions were voluntary.

5. Whether petitioner Thor was denied his right to a speedy trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of possession of methamphetamine (a controlled substance) (Count I) and conspiracy to possess and distribute methamphetamine (Count II), in violation of 21 U.S.C. 841(a)(1) and 846. Petitioners were fined $15,000 on each count and sentenced to five years' imprisonment (the sentences to run consecutively), to be followed by a special parole

term of three years. In a consolidated case arising from a separate indictment, petitioner Barnett was convicted of possession of a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2), and sentenced to ten years' imprisonment, to be served concurrently with his other terms of imprisonment.[1]

1. On December 12, 1972, Special Agent Jerry Glass of the Office of Drug Abuse Law Enforcement,[2] working in an undercover capacity, arranged with Michael Ray Carey and Billy Joe Lee to purchase 123 vials (30 cc) of methamphetamine from them for $13,550. The sale was to occur later that same day in a Dallas shopping center parking lot, where a white panel truck containing the drugs would be parked (Tr. 46-47, 94-98, 102-103).[3]

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[1] Billy Joe Lee and Michael Ray Carey pled guilty to state charges arising from their role in the methamphetamine transaction and were sentenced to three and four years' imprisonment, respectively. Both were subsequently indicted by a federal grand jury for their participation in the same event. Each pled guilty to one count of a multiple-count indictment in exchange for the dismissal of the remaining counts and his testimony in subsequent federal prosecutions (Tr. 38-39, 56-57). Joe Don Melton was also indicted as a co-conspirator; all charges against him were dismissed in exchange for his testimony (Tr. 28-29).

[2] A predecessor of the Drug Enforcement Administration.

[3] Although Agent Glass did not know it during his undercover activities, petitioner Barnett supplied the methamphetamine and actually arranged the details of the sale. He was to receive approximately 90 percent of the purchase price of the methamphetamine sold to Agent Glass. Carey and Lee were to share the remainder (Tr. 67-70).

Two teams of agents "staked out" the parking lot in the vicinity of a white panel truck (Tr. 74-75, 90-92). Around 5:15 p.m., Carey and Lee arrived in a car driven by petitioner Barnett. Agent Glass arrived shortly thereafter and was advised by Lee and Carey that the drugs would be delivered soon (Tr. 48, 103-104). Agent Glass responded that he would return in 15 or 30 minutes and drove off in his own car (Tr. 103-104). Barnett then dropped Carey and Lee at a nearby Dairy Queen. He returned approximately fifteen minutes later, and the three men drove back to the shopping center (Tr. 49-50). Lee transferred a box containing the methamphetamine from the trunk of Barnett's car to a safe within the panel truck (Tr. 69-70, 92-93). Carey then joined Lee inside the truck (Tr. 50). Barnett drove away, but he returned to the parking lot five or ten minutes later and parked near one of the surveillance teams (Tr. 75-78, 93). In the meantime Agent Glass had returned to the panel truck, where Carey gave him the methamphetamine from the safe within the truck. Agent Glass inspected the methamphetamine, said that he was satisfied, and left, ostensibly to get the money for the purchase. Thereupon Carey and Lee were arrested by other agents (Tr. 52, 86-87, 104-105). The surveillance team parked near Barnett arrested him. Barnett was searched and found to be carrying a pistol in a shoulder holster (Tr. 78-81).

Petitioner Thor owned the white panel truck; he and his wife had purchased the safe in which the

methamphetamine had been stored (Tr. 104-106, 109, 143-144, 186-187, 283-285, 324-326).

2. Two and a half weeks later, on December 29, 1972, at about 9:00 p.m., Thor and his wife were arrested in Newport Beach, California, on state charges of carrying a concealed weapon (Tr. 177, 180-181; Hr. 128-129).[4] A search of Thor's car revealed an automatic rifle, several hundred rounds of ammunition, a newspaper clipping describing the methamphetamine arrests in Dallas, and a sales receipt for the safe used to store the methamphetamine in the panel truck (Tr. 143-144, 186-189, 283-284; Hr. 135-136). Thor was suspected of conspiracy to commit armed robbery and in that connection was questioned by Newport Beach police officers at approximately 9:30 p.m. (Hr. 132, 150-151, 159; Tr. 194, 211).

At his own request, Thor, still in custody, was interviewed again at about noon on January 2, 1973. Thor was advised of his rights and said that he understood them and that he wished the interview to proceed (Hr. 139-140, 151). Thor then said that he was innocent of conspiracy to commit robbery but admitted that the weapons discovered at the time of his arrest belonged to him. He also volunteered to do undercover work for the police and asserted that he had worked in such a capacity for federal law enforcement officials in Texas. Finally, Thor admitted that he had previously engaged in narcotics transac-

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[4] "Hr." refers to the transcript of the pre-trial suppression hearing.

tions with Guy Baulens, a resident of Newport Beach, and that Baulens and one Kip McDonald had played some part in the methamphetamine transaction in the Dallas shopping center parking lot (Hr. 140-144; Tr. 212-213).[5]

Later that same day Thor was advised by the Newport Beach police that he was suspected of being involved in the Dallas drug transactions and that anything he said about the events in Dallas would be forwarded to the Dallas authorities (Hr. 144, 154-155). Thor then admitted that he had obtained the ingredients to manufacture the methamphetamine and that he had employed Barnett to deliver and sell the drugs (Tr. 205-206; Hr. 144-145). Thor stated that he had fled to California after observing the Dallas arrests from a nearby parking lot (Hr. 145-146).

Thor was arraigned on the following day on the charge of possession of a firearm by a convicted felon. Later he was released on his own recognizance. A Newport Beach police officer testified at the suppression hearing that Thor had not been arraigned earlier because of the holiday weekend (Hr. 148-149).[6]

3. On or before January 19, 1973, Thor telephoned Agent Glass at his office in Dallas and said that he wanted to "clear some things up" (Tr. 248-249). Thor then went to the agent's office on January 19 and stated that he also wanted to work with Agent

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[5] Baulens and McDonald were fugitives throughout the trial.

[6] Thor was arrested on a Saturday, December 29, 1972, and arraigned January 3.

Glass. Agent Glass advised Thor he would have to reveal his role in the Dallas methamphetamine transtion before further discussion would ensue (Tr. 248). When Thor expressed concern about his wife's welfare, Agent Glass said that she would not be indicted if Thor gave a statement (Hr. 113-114). Thor then telephoned a Sheriff Brown of Henderson County, Texas, for advice. He advised Thor to give a statement, Thor agreed, and Special Attorney Jackson White then advised Thor of his rights (Tr. 220-225, 264-265; Hr. 65, 92-93, 114). Thor thereupon detailed the arrangements for the manufacture and sale of the methamphetamine involved in the Dallas arrests (Tr. 283-287). Thor also wrote out a formula for the manufacture of liquid methamphetamine. The statement was reduced to writing and signed by Thor (Tr. 225-226, 288).

Thor was not in custody during his appearance at Agent Glass' office, and at the conclusion of the interview he left (Hr. 66). At the time of the interview Agent Glass was not aware of Thor's prior California confession of January 2, 1973 (Tr. 240-244, 269-270; Hr. 107). Special Attorney White testified that he could not recall if he had been advised of the prior confession (Tr. 238-239; Hr. 70-72).

On February 6, 1973, Thor met again with Special Attorney White at the latter's office. White advised Thor of his rights, and Thor thereafter made another oral statement, which was reduced to writing and signed by Thor (Tr. 229-230). In this statement Thor described his attempt to conceal the illegal source

of his methamphetamine by using false hospital labels on the vials[7] (Tr. 291-292).

At the pre-trial suppression hearing, and again at trial, the district court ruled that the January 19 and February 6 confessions were admissible (Hr. 183; Tr. 271-272, 281, 289-291). However, the trial court ruled that the California confession of January 2 was inadmissible under 18 U.S.C. 3501[8] because of a delay in petitioner Thor's arraignment[9] (Tr. 213).

ARGUMENT

1. Petitioner Barnett contends (Pet. No. 75-285, at 6) that there was no probable cause to arrest him at the Dallas parking lot and that therefore the pistol seized from him at that time should not have been admitted at trial. The evidence, however, is to the contrary.

Upon Agent Glass' first rendevous with Lee and Carey in the parking lot, he was told by them that the drugs were not yet in the panel truck. Shortly thereafter the surveillance officers saw Barnett, Lee,

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[7] The evidence at trial showed that such labels were affixed to the seized vials of methamphetamine (Tr. 35, 71).

[8] That section provides that voluntary confessions are admissible in federal prosecutions and sets forth the factors to be considered by the trial judge in determining voluntariness. It also provides that delay in presenting a defendant before a magistrate does not, by itself, render an otherwise voluntary confession inadmissible if the confession was made within six hours of arrest. 18 U.S.C. 3501(c).

[9] The judge at the pre-trial suppression hearing (who was not the trial judge) had ruled that the January 2 confession was admissible (Hr. 183).

and Carey drive to the truck; Lee then transferred a package from the car to the truck (Tr. 48, 74-75, 90-93, 103-104). Once Agent Glass was shown the methamphetamine from the truck's safe, the officers had probable cause to arrest Barnett in his car as he waited nearby.[10] Since the arrest of Barnett was lawful, the handgun, which was seized from him during a search incident to that arrest, was properly admitted into evidence.

2. Petitioner Barnett also contends (Pet. No. 75-285, at 9-10) that he was prejudiced by the trial judge's comment on the testimony of a witness.

Billy Joe Lee testified as a government witness that Barnett had supplied him with the methamphetamine he sought to sell to Agent Glass. Defense counsel made no attempt to cross-examine Lee. Instead, Lee was called as a defense witness two days later in the trial, at which time he repudiated his previous testimony (Tr. 374-375). In response to questioning by the court, Lee then asserted that Agent Glass and the government prosecutor had instructed him to testify falsely that Barnett had provided the methamphetamine. The district court said, "I don't believe that" (Tr. 376). Defense counsel did not move for a mistrial or even request a cautionary instruction. Nevertheless the court, *sua sponte*, cautioned

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[10] Since Agent Glass and the surveillance team "were working in close concert with each other, * * * the knowledge of one of them was the knowledge of all. *United States* v. *Romero*, 2 Cir., 249 F.2d 371, 374 (1957)." *Stassi* v. *United States*, 410 F.2d 946, 952 n. 7 (C.A. 5).

the jury shortly thereafter that they were the sole judges of the facts "regardless of any remark" that the court might make (Tr. 378-379).

In our view, any prejudice that may have befallen petitioner Barnett in result of this remark by the district court was inconsequential in light of the other evidence against him. As the court of appeals stated (Pet. App. 5426-5427):[11]

> The court took corrective action almost immediately in terms of two cautionary instructions. The small import of the statement is seen in the fact that no motion for a mistrial or even for a cautionary instruction was made, defense counsel simply remarking that the court had reflected on "the competence of the evidence." We need not reach any question as to the right of the trial judge to comment on the evidence where the safeguard of a cautionary instruction is supplied. *See* Quercia v. United States, 1933, 289 U.S. 466, 53 S.Ct. 698, 77 L. Ed. 1321; United States v. Jacquillen, 5 Cir., 1972, 469 F.2d 380. Rather, we hold that the error here, if any, was harmless in light of the overwhelming evidence against Barnett, the contrary earlier testimony of Lee, and his [Lee's] written confession to the contrary.

3. Petitioner Barnett next contends (Pet. No. 75-285, at 12) that he was denied his right to cross-examine Billy Joe Lee. Barnett chose not to cross-examine this witness when he testified on behalf of the government; instead Barnett called Lee to testify

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[11] All references to the court of appeals' decision are to Appendix A in Barnett's petition, No. 75-285.

as part of his defense case. Lee then accused Agent Glass and the government prosecutor of instructing him to perjure himself and falsely incriminate Barnett. The government cross-examined Lee and impeached this testimony with Lee's previously given confession. Petitioner Barnett claims that his own right to cross-examine Lee was denied when the district court allowed the government to cross-examine Lee. Barnett does not claim, however, that the trial court in any way restricted his questioning of Lee.[12] The basis of his complaint seems to be, rather, that the trial judge should not have allowed the government to impeach its own witness. But as the court of appeals stated, "[t]he plain answer to this claim is that Lee was called as a defense witness and any claim to the contrary is spurious" (Pet. App. 5427). In short, it was not error for the district court to allow the government to impeach Lee, and petitioner's right to cross-examine him was not implicated in any way.

4. Petitioner Thor contends (Pet. No. 75-5339, at 6-7) that the written statements he gave to Agent Glass and Special Attorney White on January 19 and February 6 were tainted by his prior (January 2) California confession, which the district court suppressed.

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[12] This distinguishes *Chambers* v. *Mississippi*, 410 U.S. 284, upon which petitioner Barnett relies, since in that case the defendant was absolutely precluded from questioning in an adverse manner a witness he had called to the stand, but whose testimony was harmful to the defendant.

We agree with the court of appeals that "the short answer to his allegation of taint is that there was no taint" because the district court's suppression of the California confession was erroneous (Pet. App. 5428). Thor was not in federal custody in California, and since there is no showing, nor even a claim, of a working arrangement between state and federal officers to obtain his confession, the delay by the Newport Beach police officers in presenting Thor for arraignment on the state charges did not, of itself, render his confession inadmissible under 18 U.S.C. 3501 (Pet. App. 5428). See *United States* v. *Davis*, 459 F.2d 167, 170 (C.A. 6); *Shinko* v. *United States*, 408 F.2d 361 (C.A. 9).

Indeed, since on January 19 the federal law enforcement officials did not know of the allegedly defective California confession, they could not have exploited it to obtain the confession Thor gave them on that date. See *Lyons* v. *Oklahoma*, 322 U.S. 596, 604-605.[13]

Moreover, given Thor's initiation of the first interview session with the state officers on January 2, his receipt of the *Miranda* warnings and waiver of rights, and the fact that at the commencement of the second interview session he was explicitly advised that any statement he made would be sent to the Dallas

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[13] Furthermore, since the January 19 and February 6 statements were made after Thor had been advised of and waived his *Miranda* rights, any taint from the California confession had been attenuated.

"authorities" (Hr. 139-140, 151; Tr. 207), Thor's California confession was clearly voluntary. See *Maguire* v. *United States*, 396 F.2d 327, 331 (C.A. 9), certiorari denied, 393 U.S. 1099; *United States* v. *Kinsey*, 352 F. Supp. 1176 (E.D. Pa.).

Thor also asserts that Agent Glass impermissibly induced his January 19 confession by telling him that his wife would not be indicted if he made a statement. But Thor initiated the contact with Agent Glass and came voluntarily to his office; while there he was never in custody and left freely of his own accord. Although it was probably not required, Thor was given full *Miranda* warnings before he made his statement. And it was Thor who broached the subject of his wife. Thor makes no claim that he was subjected to blandishment, cajolery, or deceit by the federal agents. Viewing the totality of the circumstances (*Davis* v. *North Carolina*, 384 U.S. 737), it is plain that Thor's will was not overborne by Agent Glass' representation, and that Thor's confession was voluntarily given. See *United States* v. *Culp*, 472 F.2d 459 (C.A. 8), certiorari denied, 411 U.S. 970.

5. Petitioner Thor argues (Pet. No. 75-5339, at 5-6) that he was denied his right to speedy trial by the delay in transporting him, while in federal custody, from Oregon (where he was arrested on these charges) to Texas (where he was tried).

Thor's trip to Texas began on March 12, 1974, and concluded on May 28, 1974. While en route Thor spent forty days in the federal prison at Marion, Ohio. This forty-day delay was the result of a mix-up

involving Thor and another prisoner; the latter was sent to Dallas instead of Thor (Pet. App. 5430). On May 29, 1974, the day after Thor's arrival in Dallas, counsel was appointed for him. Thor's request for trial was made on July 8, 1974, and trial commenced on July 17, 1974 (Pet. App. 5431).

This Court in *Barker* v. *Wingo*, 407 U.S. 514, 530, identified four of the factors to be considered in determining whether a particular defendant has been denied his right to a speedy trial: length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. None of these factors supports petitioner's claim. Here the relevant period of delay amounted to no more than about three months. It was not caused by the government's attempt deliberately to delay the trial, or for any other reason evincing governmental intent to hamper petitioner in his defense against the charges or to incarcerate him unnecessarily. Petitioner's first request that trial be scheduled occurred only nine days before trial actually commenced. Finally, petitioner points to no specific prejudice caused him by the delay, but relies instead on generalized allegations of discomfort. Balancing all these factors, we think it plain that petitioner has failed to show that he was denied his constitutional right to a speedy trial.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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